In The Supreme Court

of the

United States

October Term 1958

No. 360

JOHN ROBERT JONES,

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit

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OCTOBER TERM, 1958

No.

JOHN ROBERT JOINES,

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The petitioner, John Robert Joines, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW

The original opinion of the United States Circuit Court of Appeals for the Third Circuit was filed on June 25, 1957, is reported in 246 F. 2nd 278, and is appended to this petition.

The opinion of the United States Court of Appeals for the Third Circuit on remand from the United States Supreme Court (see 387 October Term 1957—June 30, 1958) is as yet unreported, but is appended to this petition.

The memorandum of the United States District Court, originally denying petitioner's motion to suppress the evidence, was filed on December 6, 1956, is unreported, but is set forth in full on pages 32a-36a, of the Appellant's Appendix in Court below.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The jurisdiction of the Supreme Court of the United States is invoked to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered on August 14, 1958, and the order of the said Court, dated August 14, 1958. The statutory authority conferring on the Supreme Court of the United States jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit, is the Act of Congress of June 25, 1948, c. 646, 62 Stat. 928, 28 USCA 1254(1).

THE QUESTIONS PRESENTED FOR REVIEW

1. For a search of petitioner's home with only a warrant for

petitioner's arrest and seizure of evidence within it to be admissable as incident to an arrest of petitioner, is it necessary that there be an initial valid arrest of the petitioner and that he be present and in control of the premises when the search and seizure is made?

2. If the complaint does not show on its face whether the affiant spoke with personal knowledge of matters therein; does not indicate any source of the complainant's belief; nor set forth any basis upon which a finding of probable cause could be made, is the warrant of arrest issued pursuant thereto a valid warrant of arrest?

3. Were the agents, who had conducted surveillance of petitioner's home for months and had adequate knowledge of facts sufficient to support an affidavit for a search warrant, required to first secure a search warrant if reasonably practicable, if they did not first lawfully arrest petitioner before they searched his home and seized evidence in it?

4. Should not the writ be granted if the Circuit Court's opinion directly conflicts with opinions of other Circuit Courts on the requirement that a search and seizure without a search warrant be preceded by an initial valid arrest?

5. Was the warrant of arrest valid when it had been carried about by agents who for 21 days, passed up daily opportunities to arrest petitioner and, on the 21st day, used it as authority to enter the petitioner's home ostensibly to search for him and arrest him?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth and Fifth Amendments to the Constitution and Rules of Criminal Procedure 3, 4, 11(d) and 52(b), which are printed in appendix hereto.

STATEMENT OF THE CASE

The petitioner is a dairy farmer and lives in York County, Pennsylvania, on his 130 acre farm. In September, 1954, William L. Riley, Investigator of The Alcohol and Tobacco Tax Unit of the Internal Revenue Service—Baltimore Office—suspected that petitioner was violating the Alcohol Tax provisions of the Internal Revenue Laws (App. 55a, 56a).

For five weeks or more Riley and other investigators of the Alcohol and Tobacco Tax Unit kept petitioner's home under surveillance by "day" and "night," from "two to six" days each week, from "six to fourteen" hours per day, from hidden points on or near to petitioner's farm home, employing vehicles and radio equipment in so doing (App. 55a, 56a). They saw "known violators" visiting petitioner's home, driving their cars in with the lights "out" or parking their cars some distance away and walking to petitioner's home (App. 56a); they saw petitioner and a "known violator" unloading 100 pound bags of sugar, placing it on the porch of petitioner's home (57a).

About five weeks after surveillance started, on November 19, 1954, Investigator Riley and his investigators observed a truck, convoyed by a car, leave petitioner's home. They followed this "convoy" from petitioner's home in York County, Pennsylvania, to Rising Sun, Maryland, where they stopped the truck which was driven by two men, neither of whom is the petitioner. The unidentified driver of the convoying vehicle fled (App. 57a-59a).

The truck drivers were arrested and the truck was searched revealing a cargo of 101 gallons of non-tax-paid whiskey (App. 59a).

On November 22, 1954 Investigator Riley appeared before the U. S. Commissioner in Baltimore and filed a complaint against petitioner with "removing, depositing and concealing" a distilled spirits cargo, thereby violating the Internal Revenue Code (26 USCA 1940 ed. [1] R.C. 1939), section 2803 and section 3321(a). (R. 3) A warrant for the arrest of petitioner was issued on the same day and was given to Investigator Riley. (App. 29a-31a).

Although the warrant thus issued, stated, "To any United States Marshal or any other authorized officer * * * You Are Hereby Commanded, in the name of the President of the United States of America, to apprehend the said John Robert Joines * * *, *wherever found and bring his body forthwith before me* or any other Commissioner * * *." (App. 29a). Investigator Riley (and other officers), instead of executing the warrant, kept it in his possession (App. 62a), and conducted further surveillance of petitioner's home for the following twenty-one days. Although Riley saw petitioner at his farm almost every day during this "post-warrant" period of surveillance, he did not arrest him (App. 66a-); and, moreover, on one occasion saw petitioner drive away from his home with what was observed by Riley to be another cargo of whiskey. He "trailed" petitioner but did not arrest him, choosing to continue his surveillance (App. 60a).

Investigator Riley decided to execute the warrant "* * * before the arrest warrant got too old, before the time of the violation had gone too far past * * *." (App. 62a). The date for arrest was set for December 13, 1954, and a group of four officers was dispatched on that day to go to petitioner's home and arrest him (App. 62a, 63a). Investigator Riley then turned the warrant over to one of the other four investigators, and,

instead of assisting them, went to York, Pennsylvania, for the stated purpose of interviewing an informant regarding this case (App. 62a, 63a).

The investigators—four of them—in two autos, while Riley was in York to see his informant, approached petitioner's home at about 10:00 A.M. At this precise moment and by coincidence, the petitioner was not at his home but was sixteen miles distant in York, Pennsylvania, at the York County Court House attending court—the very place Investigator Riley appeared for the purpose of interviewing some unidentified informant (App. 61a) and, although he could have arrested petitioner at that time, he did not do so, nor did he make any effort to phone the arresting party then converging on petitioner's home (App. 61a, 65a).

Investigators Milewski, Cleary, Lorfing and Lenhoff, proceeded to petitioner's home, Milewski and Lorfing knocking on the front door, the other two deploying to outbuilding points (App. 39a). The only occupants of petitioner's home at this time were his 17 year old son and 21 year old nephew (App. 27a). His son answered the door and the investigators told him that they had a warrant for the arrest of his father, the petitioner, John Robert Joines. The officers were told the petitioner was not at home (App. 12a). The officers then stated they were going to search the home (App. 12a), and they "walked in" the opened door, without being refused admission (App. 12a, 13a). The officers then proceeded on a systematic search of the house—from the first floor to the attic—searching each room and the closets of each room (App. 16a). Next, they went to the outside where they noticed an outside entrance to the cellar.

The doors to this entrance were locked and the officers state they could lift these doors a few inches through which they peered, determined that petitioner was not therein (App. 17a); and saw mash barrels and sugar, and detected an odor of mash. Investigator Milewski then testified, " * * * And, Investigator Lorfing and I kicked the door entirely off its moorings and proceeded down the stairs with a flashlight" (App. 17a). They searched the cellar and found a 500 gallon still, mash and other products. At this point they arrested the petitioner's son, a juvenile, and his nephew, 21 years of age, and handcuffed them (App. 17a).

Investigator Riley at this time returned from York and arrived on the scene of the search and seizure. Samples of the mash and whiskey were taken.

The petitioner was not arrested until the following day, December 14, 1951, when he appeared voluntarily before the U. S. Commissioner at York, and submitted himself to arrest (App. 30a) on the original warrant.

The petitioner was indicted on October 11, 1955, and charged violations of sections 2810, 2833, 2834 and 3321 of the Internal with violations of sections 2810, 2833, 2834 and 3321 of the Internal Revenue Code (USCA - 1939 I.R.C.) for failing to register a still, distilling spiritous liquor without giving bond, making mash and removing and concealing spiritous liquor - all violations of the Internal Revenue Code based upon evidence searched for and seized on December 13, 1951, in petitioner's home (App. 1a, 3a).

Petitioner presented a timely motion to suppress the evidence (App. 6a-8a), and the government filed its Opposing Affidavit (App. 9a-12a). Hearing was held thereon (App. 13a-28a) and the Court overruled the motion and filed its Memorandum Opinion (App. 32a-36a).

At the beginning of the trial, January 22, 1957, the petitioner renewed his motions to suppress which were overruled (App. 38a) and at the end the petitioner made the same motion with the same ruling of the court (App. 66a). Petitioner also demurred to the evidence and asked for a verdict of acquittal (App. 66a), all of which was overruled.

Petitioner was found guilty and sentenced to a term of two years. He is at liberty on bail.

An Appeal was taken to the Circuit Court of Appeals for the Third Circuit (App. 68a, 69a), and that court, on June 25, 1957, affirmed judgment of the District Court, and entered judgment the same date. (See unreported Opinion of the Circuit Court of Appeals, appended to this petition).

A timely motion for rehearing was filed and the Circuit Court of Appeals for the Third Circuit denied the petition on July 23, 1957.

The petitioner's 17 year old son, arrested at the scene of the "raid" on December 13, 1951, was discharged before trial because of his age. Petitioner's co-defendant, his 21 year old nephew, also arrested at the raid on December 13, 1951, was acquitted at trial.

Petition for writ of certiorari was filed in Supreme Court as to 387 October term 1957, and was granted on June 30, 1958.

The Supreme Court vacated Judgment of the Circuit Court

on June 30, 1958, and remanded the case for reconsideration in light of Jones v. United States, 331 October Term, 1957, decided on June 30, 1958.

On August 14, 1958, the Circuit Court filed its opinion on remand, affirming judgment of the District Court.

REASONS FOR GRANTING WRIT

1. THE CIRCUIT COURT'S OPINION ON REMAND DATED AUGUST 14, 1958, IS IN DIRECT CONFLICT WITH THE OPINION OF THE SUPREME COURT IN JONES V. UNITED STATES, DATED JUNE 30, 1958, NO. 331 OCTOBER TERM 1957, BECAUSE THE SEARCH OF PETITIONER'S HOME AND THE SEIZURE OF EVIDENCE IN IT WAS NOT A SEARCH INCIDENT TO A VALID ARREST, BECAUSE IT DID NOT FOLLOW AN INITIAL VALID ARREST.

The Court of Appeals, in its opinion, stated:

"* * * This, then, is the ca[illegible] * * * *and it falls within the exception to the rule requiring a search warrant which the Court in that case expressly pointed out, namely, 'a "search incident to a valid arrest".*

"The fact the defendant could not be found in his dwelling house did not render the presence of the officers there unlawful since they entered armed with a warrant which they were endeavouring in good faith to execute. And being lawfully in the house, they were entitled to seize the illicit articles which met their eyes. Accordingly, the fact that no arrest actually took place is immaterial. Indeed, if that were the decisive factor there would have been no purpose in remanding the case to us for further consideration. On the contrary, the Supreme Court, had it

thought this undeniable fact controlling, would certainly have reversed defendant's conviction."

The Supreme Court, in Jones v. United States, 331 October Term, 1957, decided June 30, 1958, said, (at page 6)—

> "The case of United States v. Rabinowitz, supra, upon which the District Court relied, has no application here. There, federal agents, without a search warrant, explored the office of the defendant and thereby obtained evidence used against him at trial. *But, immediately after entering the office and before their search, the agents executed a warrant they had previously obtained for the defendant's arrest. The Court stressed that the legality of the search was entirely dependent upon an initial valid arrest.* 339 *U. S., at* 60. The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them. * * * "

Petitioner does not believe that the Supreme Court could have used more clear and precise language than it did in the *Jones* case. How can there be any doubt concerning this principle: that for a search to be incidental to an arrest, it must be preceded by *and entirely dependent upon an initial valid arrest.* It is impossible to give the words of *Jones* any other meaning.

The petitioner respectfully submits that for the Circuit Court to say that if the Supreme Court "had thought this undeniable fact controlling, (it) would certainly have reversed the defendant's conviction", is simply to avoid consideration of what is obvious—that the search in the case at bar was not incident to a valid arrest because it was not preceded by an initial valid arrest.

Before June 30, 1958, the Supreme Court had never stated in quite so positive terms the principle here involved and it is respectfully suggested that the Supreme Court's order of remand "for further consideration" *in light of Jones v. United States* was an act of judicial courtesy—to permit the Circuit Court to reconsider the case for the first time with the clear and precise language of Jones v. United States before it.

The Supreme Court's requirement as laid down in *Jones v. United States*—that for a search to be incidental to an arrest it must be preceded by an initial valid arrest—is based on a long line of preceding decisions of that Court. Thus, in *MARRON v. United States*, 275 U. S. 192, the agents were armed with a warrant to search for liquor, but before they searched and seized the defendant's books from an adjoining cupboard, they had arrested defendant and he was present during the search. The principle set forth in *AGNELLO v. United States*, 269 U. S. 20, is couched in these terms at page 30: "The right without a search warrant *contemporaneously to search persons lawfully arrested* and *to search the place where the arrest is made* * * * is not to be doubted."

In *HARRIS v. United States*, 331 U. S. 145, the agents had a warrant of arrest but no search warrant and, to qualify their search, the Supreme Court carefully pointed out that defendant was *first* arrested and added, at page 152, "*Petitioner was in exclusive possession of a four room apartment*". In *RABINOWITZ v. United States*, 339 U. S. 56, in which the agents had no search warrant but a warrant of arrest, this Court was careful to point out at page 60, "*Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest*" In Rabinowitz the Court at page 61 also pointed out that "(A)

the search and seizure were incident to a valid arrest; * * * (3) the room was small and *under the immediate and complete control of the respondent*; * * * ".

Petitioner fails to understand how the Circuit Court can brush aside such a respectable body of law as that set forth above and say, "The fact that the defendant could not be found in his dwelling house did not render the presence of the officers there unlawful since they entered armed with a warrant which they were endeavouring in good faith to execute". Were not the officers in *Marron*, *Harris* and *Rabinowitz* endeavouring in good faith to execute a warrant of arrest? That "good faith" did not dispense with the requirement that there be an *initial valid arrest*. In those cases, the entry was just as lawful as in the case at bar, being based on a warrant of arrest.

Thus, the Circuit Court's Opinion is in direct conflict with the opinion in *Jones v. United States*, and for this reason the writ should be granted.

2. THE OPINION OF THE CIRCUIT COURT ON REMAND IS IN DIRECT CONFLICT WITH THE SUPREME COURT'S OPINION IN GIORDENELLO V. UNITED STATES, DECIDED JUNE 30, 1958, NO. 549 OCTOBER TERM, 1957, A CASE CITED IN JONES V. UNITED STATES, FOR THE REASON THAT THE WARRANT OF ARREST IN CASE AT BAR WAS VOID, IT BEING FOUNDED ON AN INSUFFICIENT COMPLAINT IN VIOLATION OF CRIMINAL RULES 3 AND 4.

In *Giordenello*, the validity of the warrant depended entirely on the complaint. In the case at bar, the warrant, which the Circuit Court in its opinion declared valid, must be based on

the complaint. A comparison of the complaints in the two cases will clearly demonstrate that they are identical and legally insufficient and, therefore, the warrants of arrest in each case are void.

COMPLAINT—GIORDENELLO
(p. 1-Opinion)

"The undersigned complainant (Finley) being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

"And the complainant further states that he believes that are material witnesses in relation to this charge."

COMPLAINT—CASE AT BAR
(App. 30 a)

"* * * * William L. Riley, Investigator, Alcohol and Tobacco Tax, Baltimore, Maryland, who being first duly sworn, deposes and says that John Robert Joines, R. D. No. 3, Stewartstown, Pennsylvania, on or about November 19, 1954, 11:45 P.M. at one mile north of Rising Sun, Cecil County, Maryland, on Route No. 1, in said District, in Violation of U. S. Code 26, Sections 2913 and 3321, I. R. C.—did remove, deposit and conceal 101 gallons nontaxpaid whiskey with intent to defraud the United States of tax thereon."

In *Giordenello*, at page 6, the Court said

"* * * * The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any source for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. * * * *"

* * * * * *

> "* * * Here, in the absence of an indictment, the issue of probable cause had to be determined by the Commissioner, *and an adequate basis for such a finding had to appear on the face of the complaint.*"

Thus, in Giordenello, the complaint was legally insufficient and the warrant of arrest upon which the Government had relied for support of the search and seizure, fell with it. Any fair comparison between the complaint in *Giordeniello* and the case at bar will demonstrate that they are identical in their *insufficiency*.

This argument was raised in the Circuit Court on remand of the case at bar. That court declared it was not bound to consider *Giordenello* because the order of remand did not mention it. That court's insistence on ignoring Giordenello is especially difficult for the petitioner to understand because that Court in the case of *UNITED STATES v. Asendio*, 171 *F 2nd* 122 (3 *Cir.* 1948), invoked Criminal Rule 52 (b), the same as the Supreme Court did in *Giordenello*, in a search and seizure case, to notice and act upon errors on the record not previously called to the court's attention.

There is no reason to labor the point. When the Circuit Court declared in its opinion on remand that the officers had a "valid" warrant of arrest they were ignoring and placing themselves in direct conflict with *Giordenello*. Therefore, the writ of certiorari should be granted.

3. THE CIRCUIT COURT'S OPINION ON REMAND IS IN DIRECT CONFLICT WITH THE SUPREME COURT'S OPINION IN TRUPIANO V. UNITED STATES BECAUSE THE AGENTS HAVING AMPLE OPPORTUNITY FAILED TO SECURE A SEARCH WARRANT.

in the case at bar the agents had knowledge that the petitioner's home contained "untaxpaid" liquor, the possession and concealment of which petitioner is charged in the Fourth Count. (App. 5a). Yet they did not secure a search warrant.

The agents (1) saw petitioner's truck "back in his yard" on November 19, 1951 (App. 38a, line 3); (2) saw it come from petitioner's home conveyed by another car (App. 38a, line 14); (3) trailed it for miles and when stopped, found it to be loaded with 101 gallons of untaxed whiskey (App. 39a, lines 8, 9); (4) the agents were "advised" the truck was registered in petitioner's name (App. 39a, lines 12, 13); (5) agents saw petitioner unloading 100 lb. bags of sugar onto his porch (app. 57a, lines 2-4); (6) they knew petitioner was a "prior violator" (App. 57a, line 21); (7) saw other known violators going to his home under surreptitious circumstances (57a, lines 15-20); and (8) after November 19, 1951, saw petitioner drive a second load of whiskey away from his home and followed it for miles (app. 60a, lines 9-20). The agents observed these and many other facts before they entered petitioner's home. In *CARHART v. United States*, 157 F. 2nd 777, 779 (C.C.A. 3rd, 1946), it was decided that similar but less convincing facts more than adequately supported an affidavit for a search warrant. If the agents were in possession of facts sufficiently strong to support an affidavit, were they required to first secure a search warrant before they entered petitioner's home? It must be remembered that surveillance was carried on for months and some facts were known for days and weeks prior to the time of entry of petitioner's home. Surely, the Government will not contend that

In *URMAN v. United States*, 331 F. 2d 699, the Supreme

Court found that the agents were lawfully on the premises and the arrest was valid under the theory that an offense was being committed in the presence of the officers, but at page 705, it said,

> "* * * It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. (Citing cases). This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissable and what limitations should be placed upon such activities * * *."

This is still the law today. It is still the cardinal rule. *Trupiano* has not been reversed so far as petitioner's case is concerned because the Supreme Court, in *Rabinowitz*, supra, the only case in which Trupiano is limited, has this to say,

> "* * * To the extent that Trupiano v. United States * * * requires a search warrant solely on the basis of practicability of procurring it rather than upon the reasonableness of the search *after a lawful arrest*, that case is overruled. * * *"

Thus Trupiano is *overruled* only in cases where a search has been made *after a lawful arrest*. In the case at bar the petitioner was not at his home when searched and there was no arrest of any kind at the time of the search, nor until one day later when petitioner surrendered. In *RENT v. United States*, 209 F 2nd 893, the 5th Circuit Court of Appeals makes absolutely clear that Trupiano is the law today as above set forth.

The law is as stated in *District of Columbia v. Little*, 1949, 85 U. S. App. D. C. 242, 246, 178 F. 2d 13, 17, 13 A.L.R. 2d

951, affirmed on other grounds, 1950, 339 U. S. 1, 70 S. Ct. 168, 94 L. Ed. 599:

> "* * * no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate."

The purpose of the Fourth Amendment, like that of the common law rule, is to assure, whenever possible, that the justification for breaking into a suspect's home shall be judged by a magistrate rather than a policeman. The Supreme Court said in *McDonald v. United States*, 1948, 335 U. S. 451, 155-456, 69 S. Ct. 191, 193, 93 L. Ed. 153:

> "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police, before they violate the privacy of the home."

And in *Johnson v. United States*, 1948, 333 U. S. 10, 13-14, 68 S. Ct. 367, 369, 92 L. Ed. 436, the Court said:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

Both in McDonald and in Johnson the Supreme Court noted that the Constitution does not prevent invasions of a home without a warrant in a "grave emergency" or an "exceptional circumstances." As Mr. Justice Jackson put it in his concurring opinion in McDonald:

"When an officer undertakes to act as his own magistrate he ought to be in position to justify it by pointing to some real immediate and serious consequences if he must first go to get a warrant."

Therefore, the Circuit Court's remand opinion, being in conflict with *Trupiano*, and the writ should be granted.

4. THE CIRCUIT COURT'S OPINION ON REMAND IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS WHICH HOLD THAT THE SEARCH AND SEIZURE MUST OCCUR AT THE TIME AND PLACE OF ARREST.

Certainly the Government will not dispute that (1) the search of petitioner's home occured while he was sixteen miles distant therefrom, and (2) the search occured one full day before the arrest which, even then did not occur at the place of the search.

The Circuit Court's Opinion on remand is in direct conflict with the following opinions, among others, of the following Circuit Courts:

(1) *McKNIGHT v. United States*, 1950, 183 *F 2nd* 977, C. C. A. D. C., in which the officers who had a warrant for defendant's arrest, passed up an opportunity to arrest him on the street and waited until he got to his home where they appeared, arrested him and searched his home. Judge Edgerton, in the Court's opinion, said,

> "* * * * Even if McKnight's arrest were legal it would not legalize the seizure of the evidence found in the house, *since the arrest was incident to the seizure and not the seizure to the arrest.* To call this seizure incident to this arrest is like saying that cashing a check is incident to writing it. Means are an incident to the ends, not ends to means."

The Circuit Court of Appeals for the District of Columbia, in recently commenting on the McKnight case, in *Smith v. United States*, 251 F. 2nd 751, 759, said,

"When the police use this do-it-yourself flexibility to arrest in his home a suspect whom they could have arrested earlier elsewhere, the law draws a line. It holds such an arrest and any search incident to it illegal."

In the case at bar, the warrant of arrest was carried about by the agents for 21 days before *the agents decided it was getting too old*. (App. 62a, line 3). Agent Riley received the warrant on November 23 (App. 29a) and it was not used until December 13 (App. 62a, lines 22, 23). During this period Riley saw defendant in his fields (App. 60a, lines 3-5); and "almost every night" (App. 60a, lines 6, 7). In short, he had an opportunity to arrest petitioner every day for the 21 days he carried the warrant.

The Solicitor General, in the Government's brief, in *Jones v. United States*, at pages 20 and 21, admits:

"We have no quarrel with the holdings in such cases as * * * *McKnight v. United States*, 183 F 2nd 977 (C.C.A.D.C.), where there was ample opportunity to arrest the defendant outside the home * * * *."

If the Solicitor General has no quarrel with *McKnight* where the opportunity to arrest McKnight was as he crossed the street on only one occasion, and entered his home, surely the Solicitor General would have no quarrel with a similar holding in the case at bar where agents before they entered his home, passed up opportunities for 21 days to arrest petitioner outside his home.

(2) In *LEE v. United States*, C. C. A. D. C., 232 F. 2nd 351, 1956, Judge Fahy said,

"* * * It is argued that the arrest was lawful because the officer had probable cause to know that a felony had been committed * * * *But we do not reach that question because the search and seizure were not in reality incident to the arrest. The testimony shows that the search and seizure preceded the arrest.* * *.*"

(3) In *STEEBER v. United States*, C. C. A. 10th Cir. 198 F. 2nd. 615, 1952, in which the search of the defendant's home was asserted to be based on probable cause—the crime having been committed in the presence of the officers, Judge Murrah said.

"The search was certainly not incident to the appellant's arrest for *it did not occur until the day after the search.*"

(4) In *WALKER v. United States*, C. C. A. 5th Cir. 225 F. 2nd 117, 1955, the government contended the right to arrest and therefore search was based upon probable cause. In an opinion by Judge Cameron, the Court said.

"*The arrest of appellant followed and did not precede the search.* * * * We are therefore not required to explore the controversy in progress between members of the Supreme Court as to the search which may attend a legal arrest."

(5) In *RENT v. United States*, C. C. A. 5th Cir. 209 F. 2nd 893, (1954), in which the agents arrested the defendant the day before they searched his automobile, that Court in an opinion by Judge Rives, said.

"* * * * We hold the arrests of both defendants were legal."

"The right to search incidental to arrest is, of course, a limited right. As expressed in several of the cases it is *limited to a search 'contemporaneously' conducted. Agnello v. United States* * * *."

5. THE CIRCUIT COURT'S OPINION ON REMAND IS IN DIRECT CONFLICT WITH THE CRIMINAL RULES, BECAUSE UNDER THE RULES THE ACT OF HOLDING THE WARRANT OF ARREST FOR 21 DAYS DRAINED IT OF ITS VALIDITY.

The opinion of the Circuit Court plainly holds that the holding of the warrant of arrest for 21 days, "even though they may have had opportunities during that time" to execute it, did not affect its validity. (page 3, Opinion Appendix). Petitioner respectfully argues to the contrary saying that the Rules of Criminal Procedure, the wording of the warrant, and decisions of this Court prohibit such delayed use.

While the case of *MALLORY v. United States*, 354 U. S. 1, generally stands for the proposition that one arrested shall be brought before a U. S. Commissioner, without necessary delay, the opinion does deal, at one point, at page 453, with the prompt and speedy purposes of Rules 4 (a), 4 (b) and 5 (b) and (c).

"The requirement of Rule 5 (a) is part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement. *Provisions related to Rule 5 (a) contemplate a procedure that allows arresting officers little more leeway than the interval between arrest and ordinary administra-*

tive steps required to bring a suspect before the nearest available magistrate. Rule 4 (a) provides: "If it appears from the complaint that there is probable cause to believe that an offense has been committed, a warrant for the arrest of the defendant shall issue * * * ". Rule 4 (b) requires that the warrant "shall command that the defendant be arrested and brought before the nearest available Commissioner", and Rule 5 (b) and (c) reveal the function of the prompt arrangment: * * * "

In view of the foregoing statement from *Mallory* how can it be said that a 21-day-old-warrant is valid when there was ample opportunity to execute it each day? The whole concept of the Rules is swiftness and certainty of the law.

Moreover, the body of the warrant in the case at bar commanded the agent to "*apprehend the said John Robert Joines, * * * wherever found* and bring his body *forthwith* before me". Does non use for 21 days during which the opportunity to arrest existed every day sound like the officer "apprehended (petitioner) wherever found" or that his body was brought before the Commissioner "forthwith".

In *MILLER v. United States*, 126 October Term, 1957, decided June 23, 1958, the question involved was entry into a house without a warrant of arrest or a search warrant and the Court and Government agreed that such entry should be tested by "criteria identical with those embodied in 18 U. S. C. A. 3109, which deals with entry to execute a search warrant". If such criteria was adopted in *Miller* to provide a standard or test, is there any less reason why the criteria of Rule 41 (d) should not be adopted in the case at bar to set the standard for

execution of a warrant of arrest? Rule 41 (d), with respect to search warrants, provides:

> "(d) Execution and Return with Inventory. The warrant may be executed and returned *only within* 10 *days* after its date. * * * ".

If, in the case at bar, we are going to permit the warrant of arrest to be substituted for a search warrant, and that is exactly the legal significance placed upon it by the Circuit Court, should we not then impose upon it the same criteria, or time limit, found in the Rules regarding a search warrant? Indeed, the Government surely will not argue that the *scope and authority of a warrant of arrest is greater than that of a search warrant.* Search incident to arrest is an *exception* to the rule that a search warrant is necessary and should not the exception be circumscribed to the same extent as the Rule? Yet, the Circuit Court brushes aside this objection and states that there is nothing wrong with holding a warrant of arrest for 21 days, even though there is opportunity to use it, and after 21 days, use it as a legal basis to justify a search of petitioner's home from attic to cellar, even though no valid initial arrest was made.

Therefore, the writ should be granted.

CONCLUSION

The writ should be granted because:

(1.) The Circuit Court's opinion is in direct conflict with the Supreme Court's in *JONES v. United States*, in that the search was not incident to an initial valid arrest, and

(2.) The Circuit Court's opinion is in direct conflict with the Supreme Court's in *GIORDENELLO v. United States*, in that the complaint is legally insufficient and, therefore, the warrant of arrest invalid, and

(3.) The Circuit Court's opinion is in direct conflict with the Supreme Court's in *TRUPIANO v. United States*, inasmuch as the officer had an opportunity to secure a search warrant, and

(4.) The Circuit Court's opinion is in direct conflict with the Opinions of Circuit Courts of Appeal of other Circuits on the question of the search being incidental to a valid arrest, and

(5.) The Circuit Court's opinion with regard to failure to execute the warrant of arrest for 24 days is in direct conflict with the opinions of the Supreme Court and the Federal Rules of Criminal Procedure.

Therefore, the writ should be granted.

Dated: September 12, 1958 — York, Pennsylvania

Respectfully submitted,

JUDSON E. RUCH

R. PALMER INGRAM

Attorneys for Petitioner.

Appendix A

Circuit Courts Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,186

UNITED STATES OF AMERICA

v.

J. PAUL JOINES AND JOHN ROBERT JOINES

Appeal of JOHN ROBERT JOINES

Appeal From The United States District Court

For The Middle District of Pennsylvania

Argued June 10, 1957

Before MARIS, KALODNER and STALEY, *Circuit Judges*.

ORIGINAL OPINION OF THE COURT
(246 F. 2nd 278)

(Filed June 25, 1957)

PER CURIAM:

This appeal from a judgment of conviction in a criminal case raises the question whether the defendant was convicted upon evidence obtained as a result of an unlawful search and seizure. Officers of the Internal Revenue Service armed with a lawful warrant for the defendant's arrest appeared at his dwelling house to arrest him. It turned out that he was not then at home but in the course of searching the house for him the agents after breaking open an outside cellar door came upon an illicit still in operation in the basement of the house. It is the evidence comprising this still which the defendant urges was seized unlawfully. We do not agree. We are satisfied from the evidence, as was the trial judge, that the officers searched the defendant's house in a bona fide attempt to find and arrest him and that they did not know of the existence of the still therein until they came upon it in the course of their search for the defendant. By virtue of the warrant of arrest which the officers held they had a lawful right to search the house for the defendant, breaking open outer or inner doors if necessary. *Hawkins v. Commonwealth*, 1851, 11 B. Mon. (Ky.) 395, 61 Am. Dec. 117; *Commonwealth v. Reynolds*, 1876, 120 Mass. 190, 196; *Monette v. Toney*, 1919, 119 Miss. 840, 81 So. 593, 5 A.L.R. 201 and annotation thereto; *State v. Shook*, 1944, 224 N.C. 728, 32 S.E. 2d 329; Voorhees, The Law of Arrest, 1904, Sec. 153; 1 Am. Jur., Arrest, Sec.

83; 6 C.J.S., Arrest, Sec. 14. The seizure of the still which they discovered in the course of this lawful search for the defendant was therefore not unlawful. *Love v. United States*, 1 Cir. 1943, 170 F. 2d 32, cert. den. 336 U.S. 912.

The judgment of the District Court will be affirmed.

A true Copy:

Teste:

CLERK OF THE UNITED STATES
COURT OF APPEALS FOR THE
THIRD CIRCUIT.

Appendix B

Circuit Court's Opinion on Remand From The Supreme Court

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,186

UNITED STATES OF AMERICA

v.

J. PAUL JOINES AND JOHN ROBERT JOINES

APPEAL OF JOHN ROBERT JOINES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Reargued on remand from the Supreme Court

August 4, 1958

Before MARIS, KALODNER and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 14, 1958)

By MARIS, *Circuit Judge.*

This is an appeal by the defendant from a judgment of conviction in a criminal case. The question raised by the defendant is whether the court erred in admitting evidence of an unregistered still, mash and nontaxpaid liquor discovered and seized in the defendant's dwelling house by internal revenue officers when, armed with a warrant of arrest, they searched the house in an unsuccessful effort to find and arrest the defendant. The appeal was argued at the last term and this court concluded, for the reasons given in our opinion then filed, that the seizure was lawful under the circumstances, that the evidence was properly received, and that the judgment should be affirmed. 246 F. 2d 278.

Thereafter the Supreme Court granted a writ of certiorari, vacated our judgment of affirmance and remanded the case to this court for further consideration in the light of Jones v. United States, 357 U.S. —, decided by the Supreme Court on the same day. 357 U.S. —.

We have given the most careful consideration to the opinion of the Supreme Court in the Jones case but are unable to discover that it controls the case below us. In its opinion in that case the Supreme Court said that the search and seizure there involved "were considered to have been justified because the officers had probable cause to believe that petitioner's house contained contraband materials which were being utilized in the commission of a crime, and not because the search and seizure were incident to petitioner's arrest." Viewing the case in this light the court reversed the judgment of conviction based on the seized evidence, pointing out the settled doctrine that probable cause for belief that certain article subject to seizure are in a dwelling cannot of itself justify a search without a warrant.

In the case before us, however, the facts as found by the trial judge, with which finding we agree, are that the officers searched the defendant's dwelling house in a bona fide attempt to find and arrest him and that they did not know of, or even suspect, the existence of the still, mash and liquor in the dwelling house until they came upon it in the course of their search for the defendant. This, then, is the case which the Supreme Court took pains to point out that the Jones case was not, and it falls within the exception to the rule requiring a search warrant which the court in that case expressly pointed out, namely, a "search incident to a valid arrest."

The fact that the defendant could not be found in his dwelling house did not render the presence of the officers there unlawful since they entered armed with a warrant which they were endeavoring in good faith to execute. And being lawfully in the house they were entitled to seize the illicit articles which met their eyes. Accordingly, the fact that no arrest actually then took place is immaterial. Indeed, if that were the decisive factor there would have been no purpose in remanding the case to us for further consideration. On the contrary, the Supreme Court, had it thought this undeniable fact controlling, would certainly have reversed the defendant's conviction.

Moreover, the failure of the officers to execute the warrant for 21 days even though they may have had opportunities during that time to do so did not render the warrant invalid, as the defendant urges. For ordinarily there is no legal requirement that a warrant of arrest must be executed immediately or at the first opportunity. Kent v. Miles, 1897, 69 Vt. 379, 37 A. 1115; State v. Nadeau, 1903, 97 Me. 375, 54 A. 725; State v. Kopelow, 1927, 126 Me. 334, 138 A. 625. While its execution should not be unreasonably delayed there may be perfectly

valid reasons why further investigation should be made before the drastic step is taken of arresting a citizen on a criminal charge. Certainly there is no constitutional right to be arrested promptly or otherwise.

It is true that the warrant directed the officer executing it to bring the body of the defendant "forthwith" before the commissioner. In this respect it was drawn in compliance with Rule 5(a) of the Federal Rules of Criminal Procedure which requires that an arrested person be taken before the nearest available commissioner "without unnecessary delay". This refers, however, to delay between arrest and production before a commissioner. It has nothing whatever to do with the time when the arrest is to be made.

We accordingly adhere to our previous conclusion that the judgment of conviction should be affirmed. It will be so ordered.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix C

Constitutional Provisions and Federal Rule of Criminal Procedure, 4(b) (1)

Fourth Amendment, United States Constitution—

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, United States Constitution—

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Federal Rule of Criminal Procedure—

Rule 3. The Complaint

"The complaint is a written statement of the essential facts

constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or Summons upon Complaint

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it,

a warrant for the arrest of the defendant shall issue * * * .

Rule 41. Search and Seizure

(d) Execution and return with inventory. The warrant may be executed and returned only within 10 days after its date * * * .

Rule 52. Harmless Error and Plain Error.

(f) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

BRIEF FOR THE UNITED STATES IN OPPOSITION

FILE COPY

Office Supreme Court, U.S.
FILED
OCT 14 1958
JAMES R. BROWNING, Clerk

No. 360

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN ROBERT JOINES

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

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JOHN ROBERT JOINES

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals on remand from this Court is not yet reported. The opinion of this Court is reported at 357 U. S. 573. The previous *per curiam* opinion of the Court of Appeals is reported at 246 F. 2d 278.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1958 (R. 7). The petition for a writ of certiorari was filed on September 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal officers, searching for a person in his home to execute a valid warrant for his arrest, could seize and use as evidence a still found in the home.

2. Whether the complaint adequately states the essential facts of the offense for the purposes of an arrest warrant.

3. Whether the warrant of arrest was executed within a reasonable time.

STATEMENT

A four-count indictment was filed in the United States District Court for the Middle District of Pennsylvania charging that on December 13, 1954, petitioner committed various violations of the internal revenue laws relating to liquor (26 U.S.C. 2833, 2810, 2834, and 3321) (R. 4a-5a). Before trial, petitioner moved to suppress evidence taken from his home on December 13, 1954, on the ground that the seizure was unlawful (R. 6a-8a). Upon a hearing (R. 13a-28a), the court filed a memorandum opinion denying the motion (R. 4b-7b). Petitioner renewed his motion to suppress at the beginning (R. 38a) and at the end of his trial but it was again overruled (R. 66a). He presented no defense (R. 66a). The court found petitioner guilty as charged in the indictment (R. 49b) and imposed a general sentence of two years in prison (Pet. 8). In a *per curiam* opinion, the judgment was affirmed by the Court of Appeals for the Third Circuit (Pet. 26-28). This Court granted certiorari and remanded the case for reconsideration in the light of

Jones v. *United States*, 357 U.S. 493. On reconsideration, the Court of Appeals again affirmed.

The evidence may be summarized as follows:

In September, 1954, agents of the Bureau of Internal Revenue began an investigation of petitioner for the illegal operation of a whiskey still (R. 28b-29b). They observed what appeared to be 100-pound bags of sugar being either loaded or unloaded at petitioner's farm house and also saw known violators visit petitioner on many occasions (R. 29b-30b). On November 19, 1954, the agents saw a panel truck loaded with cartons similar to those used by bootleggers to transport whiskey leave petitioner's Pennsylvania farm (R. 30a, 30b-31b). The agents followed the truck, stopped it in Maryland, and found that it contained 404 gallons of "moonshine" whiskey. Petitioner was not in the truck but it was registered in his name (R. 32b). These factors led the officers to believe petitioner's home was a storage place for raw materials and a distributing point for the finished product (R. 34b). On November 22, 1954, a warrant was issued by the United States Commissioner in Baltimore, Maryland, upon the affidavit of William L. Riley, the chief agent, for the arrest of petitioner for removing, depositing and concealing nontaxpaid whiskey (R. 33b).[1]

---

[1] In his affidavit, agent Riley deposed and said that petitioner, in violation of named statutes, "did remove, deposit and conceal 404 gallons of nontaxpaid whiskey with intent to defraud the United States of tax thereon". (R. 30a). In addition, the record shows that Riley had personally observed the activities of petitioner set forth above, had led the group

At the time the officers obtained the warrant they had not yet located the still which was the source of the illegal whiskey. They thought it inconceivable that the still would be located in petitioner's home, as it was generally considered unwise by those engaged in the illegal liquor traffic to have a still located at the home of an operator, particularly when the home was also used to distribute the finished product and to store raw materials (R. 34b, 46b).[2] Concerned over the whereabouts of a still which could produce a large volume of whiskey, the agents continued the search for the still before they arrested petitioner so that production of the contraband liquor could be stopped as soon as possible (R. 29b, 33b-34b). After searching diligently for several weeks with negative results, the agents were ordered by their supervisor to arrest petitioner for the violation described in the warrant (R. 34b-35b).

On December [illegible], 1954, four of the agents went to petitioner's home with the warrant and were admitted by petitioner's son and nephew. The agents presented their official credentials and stated that they had a warrant for the arrest of petitioner (R. 12b-13b). Although the agents were told that petitioner was not at home, they noticed that the son and nephew seemed nervous and upset. This led the agents to believe that petitioner was on the premises, so they

---

of agents who followed and seized the truck, had checked the registration and inspection certificate on the truck, and had appeared in person before the commissioner (R. 29b-33b).

[2] In eleven years of experience, agent Riley had never before had a case where the offender's home was used for all three purposes (R. 28b, 34b).

proceeded, without opposition, to search the house for him (R. 13b-14b). Petitioner's son corroborated the officers' testimony that they told him they were searching for petitioner (R. 27b). They found a locked door on the first floor which petitioner's son said led to the basement, but for which he had no key. In the attic, the officers found illegal whiskey in jars (R. 14b). One of the agents testified (R. 14b):

> * * * I went back downstairs and out the back door and I noticed an entrance to a cellar. The door was fairly loose, and I raised it approximately 12 inches and looked in and saw several barrels, sugar bags, and a strong odor of fermenting mash. I asked Investigator Milewski to verify my findings. He looked in and verified it, and he also got the odor. We then pulled the door open, which gave way very easily. I went into the basement and there was an adjoining room to the basement. I went in there looking for Bob Joines, but he was not there, but this large distillery was that [sic] I saw.

It was the evidence obtained from the cellar that petitioner claims had been illegally seized.

The next day petitioner appeared at the United States Commissioner's office with his attorney and submitted to arrest (R. 44b).

The trial court found as a fact that the officers entered petitioner's house in good faith and observed the violations in the course of their search for petitioner. It concluded that, since the officers were lawfully on petitioner's premises, they had a right to seize the evidence which was in plain view (R. 4b-7b). On appeal, the Court of Appeals agreed with the trial judge that the evidence supported a finding that

the officers searched petitioner's house in a *bona fide* attempt to find and arrest him (Pet. 26-28). On remand, the Court of Appeals adhered to this finding and again affirmed, saying (Pet. 31):

> * * * This, then, is the case which the Supreme Court took pains to point out that the Jones case was not, and it falls within the exception to the rule requiring a search warrant which the court in that case expressly pointed out, namely, a "search incident to a valid arrest".
>
> * * * [T]he fact that no arrest actually then took place is immaterial. Indeed, if that were the decisive factor there would have been no purpose in remanding the case to us for further consideration. On the contrary, the Supreme Court, had it thought this undeniable fact controlling, would certainly have reversed the defendant's conviction.

ARGUMENT

1. In this case four alcohol tax unit agents armed with an arrest warrant went to petitioner's home during daylight hours to arrest him. Having stated the purpose of their visit to petitioner's son and nephew, the entry of two of the agents into the house was not opposed. Although the agents had been informed by the son and nephew that petitioner was not at home, their suspicious actions led the agents to disbelieve them. The agents failed to find petitioner in the house, but they did come upon and seize a large distillery. The agents then arrested the son and nephew. The agents did not know or suspect that the distillery was in the house; in fact, they had spent weeks searching elsewhere in the belief that petition-

er's distillery would not be in the home. There was ample basis for the district court's finding that the agents entered to make an arrest and not a search, but that, having lawfully entered the place where a contraband distillery was located, they were fully justified in seizing it.[3]

As the Court of Appeals ruled, this case is different from *Jones* v. *United States*, 357 U. S. 493. In *Jones*, the issue was whether federal agents entered to make an arrest or to search for contraband. A majority of the Court concluded (357 U.S. at 500) that "The testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, and not to arrest petitioner,"

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[3] Petitioner notes in his statement of the case (Pet. 6), although he does not argue the point thereafter in his petition, that Agent Riley went to a neighboring town to meet an informant while the other agents were proceeding to petitioner's house to arrest him. While looking for the informant in a last effort to locate the still, Riley saw the petitioner in the courtroom of the County Court House (R. 47b-48b). Petitioner suggests that the agent should have arrested petitioner at that time or at least should have called the other agents to tell them that petitioner was not at home. The same suggestion was squarely put to the agent at trial and the agent replied that "If I had arrested Robert Joines at that time, it would have been obvious to him the identity of the person that I was going to talk to. At that particular time my interest then and my interest now is to conceal the identity of that person; * * * since his arrest was imminent anyway since Investigator Lorfing had the arrest warrant, and since he had to come back to his place of residence, it would be better if I let the plan go through and let the arrest be effected there without causing a commotion in that Court Room and without possibly as I said before, identifying the person with whom I intended to speak" (R. 47b-48b). Moreover, there was no way in which agent Riley could have contacted the other agents (R. 47b).

and that the district court had so found (357 U.S. at 497). Here, however, the trial judge specifically found that the agents entered for the sole purpose of making an arrest, not a search.

Petitioner's contention (Pet. 9-12) that *Jones* decided that, absent a search warrant, only searches incident to a valid arrest are lawful, confuses this case with cases where a search is made coincidentally with, or subsequent to, an arrest and as its incident. See *e.g. Agnello* v. *United States*, 269 U. S. 20; *Harris* v. *United States*, 331 U. S. 145; *United States* v. *Rabinowitz*, 339 U. S. 56. Our position here, similar to our position in *Jones*,[4] is that there was no search made for the still, as an incident to an arrest or otherwise; the only search made was for the petitioner in order to arrest him.[5] But, having stumbled upon the contraband still in the course of the search for petitioner, the officers properly seized contraband in plain sight. *Marron* v. *United States*, 275 U. S. 192. It is the rightfulness of the entry which is crucial, not whether or not an arrest was made. *Love*

---

[4] "Its [the government's] argument is: • • • From the record it is 'rational' to infer that the federal agents entered petitioner's house with the purpose of arresting him, upon probable cause to believe that he was guilty of a felony and that he was then in the house. Consequently, the agent's entry was justified, and, once in the house, while searching for petitioner, they could properly seize all contraband material in plain sight." 357 U.S. at 499.

The Court disagreed, not with the logic of the Government's position, but with its interpretation of the record.

[5] For this reason, cases like *Trupiano* v. *United States*, 334 U.S. 699, and *McKnight* v. *United States*, 183 F. 2d 977 (C.A. D.C.), dealing with the right to search after a valid arrest, are not pertinent.

v. *United States*, 170 F. 2d 32, 33 (C.A. 4), certiorari denied, 336 U.S. 912; *Paper* v. *United States*, 53 F. 2d 184, 185 (C.A. 4); *Lane* v. *United States*, 148 F. 2d 816 (C.A. 5), certiorari denied, 326 U.S. 720; *Martin* v. *United States*, 183 F. 2d 436, 439 (C.A. 4), certiorari denied, 340 U.S. 904.

2. When before the Court of Appeals on remand, petitioner for the first time asserted that the complaint upon which the warrant of arrest was based failed to allege sufficient facts upon which a finding of probable cause could be made. In *Giordenello* v. *United States*, 357 U.S. 480, this Court held insufficient a complaint which alleged that the defendant in that case, at Houston, Texas (p. 481), "did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation;" saying (p. 486):

> The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. * * * [T]hese deficiencies could not be cured by * * * reliance upon a presumption that the complaint was made on * * * personal knowledge * * *. Finley's testimony at the suppression hearing clearly showed that he had no personal knowledge * * *.

In this case investigator Riley personally conducted a surveillance at petitioner's Pennsylvania farm over a period of weeks. He followed the truck from the farm into Maryland and saw that it was loaded with the sort of cartons commonly used by bootleggers

when transporting their wares. He participated in the seizure of the truck and its cargo of nontaxpaid alcohol. He checked the registration and inspection certificate for the truck and found that they led back to petitioner. Then he went before the commissioner and made the following complaint (R. 30a):

> * * * William L. Riley, * * * being first duly sworn, deposes and says that John Robert Joines, RD #3, Stewartstown, Pa. on or about November 19, 1954, 11:45 p. m. at one mile north of Rising Sun, Cecil Co., Md. on Rt. #1 in said District, * * * did remove, deposit and conceal 404 gallons nontaxpaid whiskey with intent to defraud the United States of tax thereon.

We think the complaint can fairly be read as being predicated on personal knowledge, which the agent in fact possessed, and that it states sufficient facts based on such personal knowledge to permit independent evaluation by the commissioner. Agent Riley personally appeared before the commissioner and specifically named and identified petitioner as the offender. He pinpointed the place and time of the offense and the precise quantity of contraband involved. The complaint does not contain the mass of evidentiary details known to Riley to which he testified at the trial, but there is no requirement that it contain all such data. It suffices if the complaint itself is sufficient, as we submit this complaint was, to justify issuance of the warrant.[6]

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[6] Unlike *Giordenello* v. *United States*, 357 U.S. 480, where the defendant urged before the trial court that the complaint was inadequate, here petitioner did not challenge the complaint prior to conviction and indeed never questioned the complaint or warrant prior to the remand by this Court.

3. Petitioner also argues that the warrant of arrest was invalid because the agents did not execute it immediately. However, the record presents a perfectly logical explanation for the delay in executing the arrest warrant (*supra*, p. 4). The officer justifiably wanted to locate the distillery and stop the offense as soon as possible. There is no legal requirement that a warrant of arrest must be executed at at the first opportunity, *Scher* v. *United States*, 305 U. S. 251; *Giordenello* v. *United States*, *supra*, so long as it is executed within a reasonable time. *Seymour* v. *United States*, 177 F. 2d 732 (C.A. D.C.). Unlike a search warrant, which must be executed within ten days, Rule 41(d), F. R. Crim. P., arrest warrants need not be executed within a certain time period. Rule 4(c), F. R. Crim. P. As noted by the Court of Appeals, the requirement in the arrest warrant that the arrested person be brought before the commissioner "forthwith" (App. of Forms, Form 12, F. R. Cr. P.) refers to the time between arrest and appearance, not issuance of the warrant and arrest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1958.

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